

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 19, 2007

IN RE J.A.W.

**Appeal from the Juvenile Court for Davidson County
No. 2006-002040 Betty Adams Green, Judge**

No. M2007-00756-COA-R3-PT - Filed November 8, 2007

The issue presented in this case is whether the trial court properly terminated the parental rights of D.W.S. (“Mother”) by finding that she was in substantial noncompliance with the permanency plan, Tenn. Code Ann. § 36-1-113(g)(2). We hold that the State Department of Children’s Services (“DCS”) failed to prove by clear and convincing evidence that it exercised reasonable care and diligence to provide services to Mother to achieve reunification of Mother and child. We further hold that the trial court did not err in finding that DCS had not proven by clear and convincing evidence that Mother was incompetent to care for her child due to mental impairment, Tenn. Code Ann. § 36-1-113(g)(7)(B)(i). The judgment of the trial court terminating Mother’s parental rights is reversed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed;
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

C. Michael Cardwell, Nashville, Tennessee, for the Appellant, D.W.S.

Robert E. Cooper, Jr., Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the Appellee, State of Tennessee, Department of Children’s Services.

Laura A. Stewart, Nashville, Tennessee, guardian ad litem for minor, J.A.W.

OPINION

I. Background

The minor child at issue in this case, J.A.W. (“the child”), was born to Mother on April 21, 2006. Three days after the child’s birth, DCS removed the child from Mother. On April 27, 2006, the Davidson County Juvenile Court granted DCS’s petition for emergency removal and custody, in which DCS alleged that Mother’s untreated mental illness and instability posed a threat to the child’s welfare.

On May 22, 2007, one month after the child was born, DCS conducted a staffing meeting and created a permanency plan for the child that listed two alternative goals: reunification with Mother and adoption. Mother did not attend the staffing meeting. The permanency plan required Mother to obtain a mental health assessment and prescribed an expected achievement date of August 22, 2006, three months after the plan was created. No one from DCS ever gave Mother a copy of the permanency plan.

Mother’s DCS case manager, Phenessia Thompson, testified that she made no attempt to contact Mother until early August 2006, when she went to Mother’s home, found no one there, and left her card in the door. Ms. Thompson mailed Mother a letter dated August 14, 2006, requesting, among other things, that Mother obtain a mental health evaluation and call Ms. Thompson to set up visitation.

On September 18, 2006, DCS filed its petition to terminate Mother’s parental rights, alleging the following grounds: (1) abandonment, Tenn. Code Ann. § 36-1-113(g)(1); (2) substantial noncompliance with the permanency plan’s requirements, Tenn. Code Ann. § 36-1-113(g)(2); (3) persistent conditions, Tenn. Code Ann. § 36-1-113(g)(3)¹; and (4) mental impairment resulting in incompetence to adequately provide for the child, Tenn. Code Ann. § 36-1-113(g)(7)(B)(i). Following a trial, the trial court terminated Mother’s parental rights on the grounds of abandonment and substantial noncompliance with the permanency plan, after finding that termination was in the child’s best interest.

II. Issues Presented

Mother appeals, raising the issue of whether the trial court erred in holding that DCS proved by clear and convincing evidence that a statutory ground existed to support termination of her parental rights. Additionally, DCS raises the issue of whether the trial court erred in failing to find that Mother was mentally impaired and incompetent to care for the child. Although Mother also raises the issue of whether the trial court erred in finding it was in her child’s best interest that her rights be terminated, we do not reach this issue because of our holding that DCS failed to meet its burden of proof in demonstrating a statutory ground for termination.

¹The petition for termination alleged that the child had been removed from Mother on April 24, 2006, but alleged in another section that the Mother’s rights should be terminated because the child had been removed by order of the court for a period of at least 6 months and that the conditions which led to the child’s removal persisted. DCS’s own factual allegations in the petition did not support this ground for termination.

III. Analysis

A. Standard of Review

A biological parent's right to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the due process clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). Although this right is fundamental and superior to claims of other persons and the government, it is not absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004). This right continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Although "parents have a fundamental right to the care, custody, and control of their children," this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute. *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger, "severing forever all legal rights and obligations of the parent." Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 565, 136 L.Ed.2d 473 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S.Ct. 1388, 1412, 71 L.Ed.2d 599 (1982) (Rehnquist, J., dissenting)). As a result, "[t]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* The constitutional protections of the parent-child relationship require certain safeguards before the relationship can be severed. *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). This most drastic interference with a parent's rights requires "the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

Termination proceedings are governed by statute in Tennessee. Parties who have standing to seek the termination of a biological parent's parental rights must first prove at least one of the statutory grounds for termination. Tenn. Code Ann. § 36-1-113(c)(1). Secondly, they must prove that termination of the parent's rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2). Because the decision to terminate parental rights has profound consequences, courts must apply a higher standard of proof in deciding termination cases. Therefore, to justify termination of parental rights, the party seeking termination must prove by clear and convincing evidence the ground (or grounds) for termination and that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., Aug. 13, 2003), *no appl. perm. filed*, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to either as to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's specific findings of fact are first reviewed and are presumed to be correct unless the evidence preponderates against them. We then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *In re S.M.*, 149 S.W.3d 632, 640 (Tenn. Ct. App. 2004). The trial court's conclusions of law are reviewed *de novo* and are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Grounds for Termination of Parental Rights

_____The trial court terminated Mother's parental rights based upon its finding that DCS proved two statutory grounds: abandonment and substantial noncompliance with the permanency plan. On appeal, DCS concedes that abandonment is not a proper ground for termination because DCS did not give Mother notice of the definitions and potential consequences of abandonment as required by Tenn. Code Ann. § 37-2-403(a)(2)(A). As to the second ground for termination, substantial noncompliance with the permanency plan, it is our determination that DCS failed to demonstrate clearly and convincingly that it exercised reasonable care and diligence to provide services to Mother that would have promoted a reunification of the family. DCS's lack of diligence included failing to provide Mother with a copy of the plan, timely explaining to Mother what was required of her to regain custody of her child, and providing services to Mother. Although the actions of DCS in this case may have been well-intentioned, they were not in compliance with the letter or the spirit of the law. It appears that DCS never intended to assist Mother in reuniting with her child and gave up on Mother at the outset. We further hold that the trial court did not err by failing to find that DCS did not prove by clear and convincing evidence that Mother was mentally impaired to an extent that she was incompetent to care for the child.

1. Reasonable Efforts by DCS

_____The trial court terminated Mother's parental rights based upon its finding, among other things, that Mother failed to comply with her responsibilities under the permanency plan, a written document which sets out the requirements to achieve family reunification or other appropriate goals. Tenn. Code Ann. §§ 37-2-402(8), -403(a)(1). Parental rights may be terminated upon proof, by clear and convincing evidence, that "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care. . . ." Tenn. Code Ann. § 36-1-113(g)(2). The requirements must be stated in specific terms and must be reasonably related to the specified goal. Tenn. Code Ann. § 37-2-403(a)(2)(A).

DCS issued the permanency plan in this case after it removed the child from Mother. DCS was statutorily required, in the absence of aggravating circumstances, to make reasonable efforts to reunite the family after removing the child from Mother's care. Tenn. Code Ann. §§ 37-1-166(a)(2),(g)(2)(2005); *In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 WL 1838179, at *9 (Tenn. Ct. App. Aug. 16, 2004), *perm. app. denied* (Tenn. Nov. 8, 2004); *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326 at *7 (Tenn. Ct. App. M.S. Mar. 9, 2004). In the recent case of *In re Tiffany B.*, 228 S.W.3d 148 (Tenn. Ct. App. 2007), this Court discussed the responsibility placed on DCS to make reasonable efforts to reunify children with their parents after removing the children from their parents' home, stating in pertinent part as follows:

[T]he Tennessee General Assembly has established the policy that children should not be removed from their parents' custody unless the separation is necessary for the child's welfare or is in the interest of public safety, Tenn. Code Ann. § 37-1-101(a)(3) (2005), and that once children are removed, the first priority should be to reunite the family if at all possible. *In re Randall B., Jr.*, No. M2006-00055-COA-R3-PT, 2006 WL 2792158, at *4 (Tenn. Ct. App. Sept. 28, 2006) (No Tenn. R. App. P. 11 application filed).

* * *

Thus, the statutes governing dependent and neglected children and Tennessee's foster care program reflect a preference for preserving families by reuniting parents and children whenever possible. These statutes also reflect an awareness that reunifying parents and children is best accomplished by helping parents address their own challenges and improve their parenting skills.

* * *

The Department of Children's Services is the state agency with primary responsibility for the care and protection of dependent and neglected children. It plays a direct role in the removal of most dependent and neglected children from their parents' custody, and Tennessee's juvenile courts regularly place these children in the

Department's custody. Because of the prominent role that the Department plays in the lives of so many dependent and neglected children, the Tennessee General Assembly has explicitly imposed on the Department the responsibility to make reasonable efforts to reunify children and their parents after removing the children from their parents' home. Tenn. Code Ann. § 37-1-166.

The Department must memorialize its efforts in an individualized permanency plan prepared for every dependent and neglected child placed in its custody. The requirements in each permanency plan must be directed toward remedying the conditions that led to the child's removal from his or her parent's custody. *In re Valentine*, 79 S.W.3d at 547; *In re M.J.B.*, 140 S.W.3d at 656-57; *In re L.J.C.*, 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003). Reflecting the Tennessee General Assembly's understanding that the ability of parents to rehabilitate themselves depends on the Department's assistance and support, permanency plans place obligations on the Department to help parents become better able to provide their children with a safe and stable home and with consistent and appropriate care. *In re C.S., Jr.*, No. M2005-02499-COA-R3-PT, 2006 WL 2644371, at *9 (Tenn. Ct. App. Sept. 14, 2006) (No Tenn. R. App. P. 11 application filed).

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While the Department's efforts to assist parents need not be "herculean," the Department must do more than simply provide the parents with a list of service providers and then leave the parents to obtain services on their own. *In re Giorgianna H.*, 205 S.W.3d. at 519; *In re C.M.M.*, 2004 WL 438326, at *7. The Department's employees must bring their education and training to bear to assist the parents in a reasonable way to address the conditions that required removing their children from their custody and to complete the tasks imposed on them in the permanency plan. *In re Giorgianna H.*, 205 S.W.3d. at 519; *In re J.L.E.*, No. M2004-02133-COA-R3-PT, 2005 WL 1541862, at *14 (Tenn. Ct. App. June 30, 2005) (No Tenn. R. App. P. 11 application filed); *In re D.D.V.*, No. M2001-02282-COA-R3-JV, 2002 WL 225891, at *8 (Tenn. Ct. App. Feb.14, 2002) (No Tenn. R. App. P. 11 application filed).

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The Department's efforts to reunify parents and their children will be deemed reasonable if the Department has exercised "reasonable care and diligence ... to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1). The reasonableness of the Department's efforts depends upon the

circumstances of the particular case. In cases like this one, the factors that courts use to determine reasonableness include: (1) the reasons for separating the parents from their children, (2) the parents' physical and mental abilities, (3) the resources available to the parents, (4) the parents' efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parents' efforts to address the problems that caused the children's removal, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department's efforts. *In re Giorgianna H.*, 205 S.W.3d. at 519.

In re Tiffany B., 228 S.W.3d 148, 157-59 (Tenn. Ct. App. 2007) (footnotes omitted).

DCS failed to prove that it made reasonable efforts in this case. In order to hold a parent responsible for noncompliance with a permanency plan, DCS must clearly and convincingly demonstrate, among other things, that it made reasonable efforts to notify the parent what the plan required of him or her in a timely fashion. Mother could not comply with the plan if she did not know the plan requirements. Moreover, she was entitled to know what was required of her within a reasonable time of when she was required to comply.

It is unclear from the record whether Mother received notice of the staffing meeting on May 22, 2006, where the permanency plan was created. Ms. Thompson, the case manager, testified that she sent notice letters to Mother via certified and regular mail, and that the certified letter, postmarked May 18, 2006, returned unclaimed. Mother testified that she did not receive notice of the staffing meeting. Ms. Thompson stated that she made no attempt thereafter to mail or otherwise deliver a copy of the permanency plan to Mother, and further testified regarding her efforts as follows:

Q: Okay. And you had the staffing on May 22nd?

A: Yes.

Q: Okay. Did you send her a letter after the staffing to indicate what her responsibilities would be?

A: No.

Q: Did you make any attempt to get in touch with her at all to explain what her responsibilities would be?

A: No. Because I didn't have a contact number.²

* * *

Q: You knew she didn't have a phone, didn't you?

A: Yes.

Q: And you made no attempt to get in touch with her to explain what these responsibilities were?

A: No.

Q: Did you ever leave a copy of the permanency plan at – you said you left a card in the door, I think, a couple of times. Did you ever leave the permanency plan there for her to review or mail her a copy of the permanency plan?

A: No.

Q: Okay. And I think – wasn't the target date on the permanency plan was just set out until 8-22-06 [sic]. Wasn't that right?

A: Yes.

Q: It was actually an abbreviated time period for [Mother] to accomplish these goals, and yet the first letters after the permanency plan staffing you sent out were on the 4th and 14th of August.

A: Correct.

Q: That's the entire – that's over two months of not – of no contact with my client. Is that right?

MOTHER: Exactly.

Q: Is that correct?

A: Correct.

* * *

Q: But dealing with [the child], after the permanency plan, you just – what we're really talking about here is DCS feels that her mental health issues are underlying all the other allegations that they've made against her, basically. Is that right?

A: Correct.

Q: Okay. So the only actual goal or actual objective for her to accomplish is to have a mental health assessment and come back that

²The petition for emergency removal filed by DCS on April 27, 2007 contained a phone number for Mother's mother with whom she was living at the time the child was removed. It does not appear that an effort was made to call this number.

she's stable and if that happened DCS would be willing to return the kids. Is that right?

A: Under the recommendations, yes.

Q: All right. Did you attempt to set – I know you said in the past you had, but after [the child] came into custody, because this is a new child, have you made any attempts after [the child] came into custody to set up a permanency – or set up an evaluation? Did you set up an evaluation, send her a letter and say this is when it is and then she didn't show up?

A: No.

Q: You never set up any type of evaluation for her?

A: I didn't.

A copy of the letter that Ms. Thompson sent to Mother was introduced into evidence. The typewritten letter bears a handwritten note at the top stating "sent August 14, 2006." The letter states as follows:

Dear [Mother],

I realize that things have been difficult for you the last several months, and I just wanted to let you know that there is help available.

DCS wants to work with you so that you may be able to parent your child. In order for us to work with you, we are asking you to do four things.

The first is to call Mental Health Coop. to schedule an appointment at 726-3340. I realize that you don't believe anything is wrong with you. You may be right. DCS and the courts would just like you to go to this appointment and let the mental health professional see if he or she can assist you. If this professional says that you are fine and he or she does not recommend any further treatment or assessments then DCS will not bother you about it anymore. If you don't think you will be able to find transportation to this appointment I can assist you. Please call me at 532-4185. If nothing else I can get you a bus pass so that you can attend this appointment.

The second thing that we are asking you to do is call me at 532-4185, to set up a time where you can visit [the child]. Once again, if you are worried about finding transportation, I am willing to help you. I think that your grandmother, [M.W.], may also be willing to assist you.

The third thing that we are asking you to do is show to me how you can financially support your child. Are you getting disability? If so, just show me the papers. If you have job. [sic] All you have to do is show me a pay stub.

The fourth thing we are asking you to do is sign a release form so that the Department can check with the mental health provider you meet with to make sure we all have the same information.

If you do all of things [sic] we will be able to work with you so that you don't lose your right to parent [the child]. If you don't do all of these things, we will begin to work on finding [the child] a new and permanent home.

It thus appears from the record that the earliest time Mother may have had any kind of notice as to what DCS was requiring of her was less than a month before the permanency plan's goal achievement target date. Ms. Thompson stated that after she had left a card in Mother's door, at some point (it is not clear from her testimony exactly when), Mother called her and left a message telling her to "stop leaving cards in her door and if she caught me on the front porch she would beat the hell out of me, and so I didn't go back to the home." This testimony explains, and justifies, Ms. Thompson's reluctance to personally visit Mother's home; but not Ms. Thompson's failure to send Mother a copy of the permanency plan, to set up a mental health assessment, or to take any other action to assist Mother with reunification.

_____A reading of the entire record in this case leaves the distinct impression that DCS was determined to remove the child and terminate Mother's rights nearly from the time of the child's birth. It does not appear that DCS ever had as its first priority reunification of the family as is required by law. DCS took the child from Mother when the child was only three days old, and Mother never saw the child again. The record indicates that the newborn child's removal from the Mother was prompted by a referral from an unidentified person that stated:

The mother and [child] are being discharged from the hospital today. *The mother and [child] did not test positive for any drugs. [Child] appears to be healthy.* The referent is concerned because Mother did

not receive any prenatal care, so it is unknown if she has used any drugs during her pregnancy. The mother has admitted to having her two previous children removed from her care. The mother would not say who took her children. She just said “they” removed her children. It is unknown why her children were removed. The mother said that she has not seen her children in over two years. Nurses at the hospital told the referent that they saw the mother drinking [child’s] milk last night and that the mother might not be changing [child] properly. The mother does not have a phone or transportation. The mother’s mother . . . is picking the mother and [child] up today. The mother and [child] will not be living with [mother’s mother]. [Mother’s mother] can be contacted at [telephone number]. The father of [child] is not in the picture. (Emphasis added)

DCS also relied on its removal of two of Mother’s other children from her care in November of 2004 and an interview with Mother. But there was no proof at trial that Mother had neglected, abused, or mistreated the child in any manner prior to removal.

The permanency plan dated May 22, 2006, notes that Mother has a marketable skill, has a history of good functioning, loves and wants her child, and has maintained stable housing. It further notes that the child is healthy and very loveable. The permanency plan stated that Mother’s visits with the child would be supervised, but visitation was never addressed by court order nor does it appear that DCS ever attempted to arrange any visitation with Mother. The permanency plan, created almost exactly a month after the child’s birth, stated a goal of termination and adoption as well as the dual goal of reunification. “In circumstances that do not involve serious physical abuse or harm to the child, the law does not permit the Department to be passive when it removes children from their parents’ custody. The law requires the Department to bring its skills, experience, and resources to bear in a reasonable way to bring about the reunification of the family.” *In re Tiffany B.*, 228 S.W.3d 148, 160 (Tenn. Ct. App. 2007). In this case, DCS did nothing for Mother except remove her healthy newborn child from her care. DCS failed to show by clear and convincing evidence that it exercised reasonable care and diligence to provide services related to meeting the needs of the child and the family in an effort to facilitate reunification.

2. Incompetence to Care for Child Due to Mental Impairment

DCS requested the trial court to terminate Mother’s parental rights under Tenn. Code Ann. § 36-1-113(g)(8)(B), which provides for termination upon a showing by clear and convincing evidence that a parent “is incompetent to adequately provide for the further care and supervision of the child because the parent’s or guardian’s mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future.” The trial court declined to terminate Mother’s

rights on this ground. Based on our review of the evidence presented, as outlined below, we disagree with DCS's argument that the trial court erred in this decision.

We initially note that there is practically no testimony in the transcript of the hearing regarding Mother's mental condition. Mother testified, without any supporting documentation, that she had complied with the permanency plan's requirement by obtaining a mental health evaluation at Middle Tennessee Mental Health Institute and that she had been prescribed the medications Haldol and Benadryl. There was no testimony, by a health professional or otherwise, about Mother's mental health condition or any observations about Mother's alleged "odd behavior." Ms. Thompson referenced the fact that Mother's parental rights to her two older children had been terminated pursuant to a finding that Mother suffered from "untreated mental health issues."

DCS submitted into evidence a copy of the Davidson County Juvenile Court's earlier order in a separate case terminating Mother's rights to her two older children, which was not appealed, and which found that "[o]n 11/16/2004 Mental Health Co-op business records reflect that [Mother] had been diagnosed with a psychotic disorder not otherwise specified on 11/3/2004." No evidence upon which the juvenile court may have based its conclusion in the earlier termination case that Mother was mentally incompetent to provide for the care and supervision of her children was re-introduced in the present case.³

DCS's petition for emergency removal and custody of the child, filed six days after the child was born, contains the allegations DCS argued justified the child's emergency removal. Among other things, these allegations included that Mother exhibited odd behavior, appeared not to be able to stay focused during conversations, was unable to process information, and while in conversation tended to shift from one subject to another in mid-sentence. The juvenile court referee's order finding the child to be dependent and neglected, entered November 1, 2006 after a hearing held on August 2, 2006, makes written findings of fact that are identical, verbatim, to the allegations presented in DCS's petition for emergency removal. No additional factual information, nor further allegations, are presented in the referee's order.

DCS presented no evidence about Mother's alleged mental instability at the termination hearing; no one testified about her alleged "odd behavior" or her inability to stay focused or to process information. The trial court made no finding regarding Mother's mental condition other than to note that she had not complied with the permanency plan's requirement to obtain a mental health assessment. Under these circumstances, the trial court did not err in declining to terminate Mother's parental rights under Tenn. Code Ann. § 36-1-113(g)(8)(B), because DCS failed to prove by clear

³The other written finding supporting termination on the mental impairment ground made by the juvenile court in the earlier case stated as follows: "The mother never presented to DCS any documentation that she had received said [mental health] evaluation. As mother failed to appear at the trial after receiving notice, the state is entitled to the missing witness presumption. Evidence of a mental evaluation and any subsequent treatment would be in the control of [Mother]. The state is entitled to a presumption that said evaluation and treatment has not been completed."

and convincing evidence that Mother is incompetent to adequately provide for the further care and supervision of the child because her mental condition is presently so impaired, and is so likely to remain so, that it is unlikely that she would be able to assume or resume the care of and responsibility for the child in the near future.

IV. Conclusion

_____ For the aforementioned reasons, the judgment of the trial court terminating Mother's parental rights is reversed. Costs on appeal are assessed to the Appellee, State of Tennessee, Department of Children's Services.

SHARON G. LEE, JUDGE
